No. 02-1541

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF *AMICUS CURIAE* OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

The judge at a plea colloquy advised a misdemeanor defendant of the drunk-driving charge, its elements, its penalties, and his right to an attorney. The non-indigent *pro se* defendant chose not to retain a lawyer, waived his right to counsel, and admitted every element of the offense. Years later, can the defendant use the Sixth Amendment to collaterally attack the plea colloquy for failure to offer additional advice on precisely how a lawyer might have helped him?

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INTEREST OF *AMICUS CURIAE*[1]

The National District Attorneys Association (NDAA) is a nonprofit corporation and the sole national membership organization representing local prosecuting attorneys in the United States. Since its founding in 1950, NDAA's education and training programs, publications, and *amicus curiae* briefs have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People." Local prosecutors handle the overwhelming majority of criminal prosecutions in this country. The NDAA and its members have a compelling interest in the outcome of this case because of the large practical impact it will have on the timeliness and finality of guilty pleas and the enforcement of recidivist statutes across the nation.

SUMMARY OF ARGUMENT

The Iowa Supreme Court's and the Ninth Circuit's novel reading of the Sixth Amendment, in addition to being legally wrong for the reasons set forth by Petitioner, suffers from two grave practical flaws. First, it undermines many recidivist statutes of great importance, particularly statutes targeted at drunk driving and

[1] The parties have consented to the filing of this brief. Assistant Attorney General Bruce Kempkes of the Iowa Department of Justice, counsel for Petitioner, contributed in part to the writing of this brief. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

domestic violence. This result hinders the incapacitation, deterrence, and possibly rehabilitation of these offenders. Second, the ruling below reverses the burden of proof, which as this Court has recognized requires defendants to prove that their waivers of counsel were unknowing or involuntary. The ruling below, in contrast, requires prosecutors to bear the often impossible burden of searching for transcripts of misdemeanor plea colloquies that may never have been made or have long since been destroyed. This result unsettles and upsets countless guilty pleas that were entered years ago, disrupting finality and granting recidivists a windfall of lighter sentences.

ARGUMENT

THE IOWA COURT'S DECISION UNDERMINES RECIDIVIST STATUTES AND THE FINALITY OF GUILTY PLEAS AND ERRONEOUSLY SHIFTS THE BURDEN OF PROOF ON COLLATERAL ATTACK TO THE PROSECUTION.

A. Many Misdemeanor Defendants Have Entered Guilty Pleas Without the Assistance of Counsel. Undermining the Finality of These Guilty Pleas Impairs Enforcement of Recidivist Statutes for Drunk Driving, Domestic Violence, and Other Crimes.

Although frequently classified as misdemeanors, drunk driving and domestic violence implicate serious public problems and important public policies. In the last fifty years, society and the courts have witnessed an explosion of drunk driving cases. Drunk driving is "an urgent, nationwide problem of staggering proportion." *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001). *See*

City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000); *Craig v. Boren*, 429 U.S. 190, 225 (1976) (Rehnquist, J., dissenting); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 346 n.8 (7th Cir. 1983) (referring to Pennsylvania report that drunk driving "has become perhaps one of the most dangerous and costly forms of criminal activity"), *cert. denied*, 465 U.S. 1068 (1984). Drunk driving all too frequently results in disaster and death. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at tbl. 3.106 (2002) (17,448 people died in alcohol-related motor vehicle crashes in 2001). To curb this threat, states have enacted legislation providing greater punishment for repeat drunk drivers.

Like drunk driving, the battering of women all too frequently results in disaster. It is "the single largest cause of injury to women in the United States." Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (internal quotation marks omitted). Four million women are beaten in the United States annually. Joan Zorza, *Women Battering: High Costs and the State of the Law*, CLEARINGHOUSE REV. special issue 383 (1994), *reprinted in* NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 11, 15 (2001). "The injuries that all battered women receive are at least as severe as those suffered in 90 percent of violent felonies, although the overwhelming number of domestic-violence injuries is considered to be only misdemeanors in most states." *Id.* More than thirty percent of women killed – three women per day – are murdered by their husbands, and women murdered by intimate partners frequently experience brutal deaths after years of violence. *Id.* at 16. Children

who witness battering suffer from fear, anxiety, nightmares, and behavioral problems. Stephen E. Doyne et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50(2) JUVENILE & FAMILY CT. J. 1 (1999), *reprinted in* NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 340, 341-42 (2001). To fight this pattern of violence, states have enacted laws that increase punishment for repeat domestic abusers.

Drunk driving and domestic violence are classified as misdemeanors in many states. *See, e.g.,* Iowa Code § 321J.2(2)(a), (b) (OWI, first and second offenses), § 708.2A (domestic abuse assault) (1999). Most of these cases, particularly those involving first-time drunk drivers, are resolved by guilty pleas. *State v. Novak*, 318 N.W.2d 364, 369 (Wis. 1982); *see* Scott County, Iowa, Scott County Community Jail and Alternatives Phase One Study: Section 5: Scott County Prosecutorial and Judicial Trends, at 5.9 (Nov. 15, 2001), *available on-line at* http://www.scottcountyiowa.com/cjaac/documents.html (last visited Nov. 10, 2003) (reporting that of the first- and second-offense OWI misdemeanor cases in the years 1994 to 2001, between 545 and 864 were resolved by guilty pleas each year, compared with 10 or fewer each year that were resolved by trial); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 452 tbl. 5.55 (2002) (reporting that most felony defendants who were convicted of felonies or misdemeanors in the nation's 75 largest urban counties in 1998 were convicted by plea rather than trial).

A substantial number of those guilty pleas were, like Respondent's, made without the assistance of counsel. *See, e.g., Nichols v. United States*, 511 U.S. 738, 741 (1994) (defendant entered *pro se* guilty plea to misdemeanor OWI

charge); *United States v. Smith*, 171 F.3d 617, 619 (8th Cir. 1999) (defendant entered *pro se* guilty plea to simple misdemeanor assault); *State v. Garrity*, 708 So.2d 1096, 1097 (La. App. 1998) (defendant entered *pro se* guilty plea to misdemeanor OWI charge); CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES 1, 7 tbl. 14 (Bureau of Justice Statistics, Nov. 2000) (nearly 30% of inmates accused of public order offenses in the nation's seventy-five largest counties report self-representation); *see also* John M. Greacen, *An Administrator's Perspective: The Impact of Self-Represented Litigants on Trial Courts – Testing Our Stereotypes Against Real Data*, JUDGES' J., Summer 2002, at 32, 32 ("By now, everyone in the judicial branch in every state knows that we are experiencing an explosion of unrepresented persons appearing in the courts of general jurisdiction of this country"); John M. Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 WM. MITCHELL L. REV. 297, 297 (1998) ("Across America, there has been a recent increase in the number of *pro se* . . . litigants in the federal and state court systems").

Under the decision below, every one of those guilty pleas is at risk of being overturned whenever the defendant comes into court as a repeat offender. Upsetting these convictions will undermine recidivist statutes' aims of deterring and incapacitating dangerous repeat offenders, leading to more drunk-driving and domestic-violence deaths and injuries. *See generally Ewing v. California*, 538 U.S. 11, __, 123 S. Ct. 1179, 1188 (2003) (recidivist statutes serve both to incapacitate and to deter); *Parke v. Raley*, 506 U.S. 20, 26 (1992) ("Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times"). Sentencing courts would be forced to ignore many recidivists' earlier

convictions. This result would under-punish and fail to deter or incapacitate dangerous recidivists.

Drunk drivers and wife beaters are usually not one-time offenders, but rather alcoholics or chronic abusers. Harvey J. Hoffman, *Healing Drunk Drivers: Michigan's OUIL/Sobriety Drug Courts*, MICH. BAR J., Jan. 2003, at 28, 30 ("Not surprisingly, alcoholic drivers offend over and over"); James L. Nichols, *Treatment Versus Deterrence*, 14 ALCOHOL HEALTH & RES. WORLD 44 (1990); *see also* LENORE E. WALKER, THE BATTERED WOMAN 55-70 (1979) (describing domestic violence as a cycle of tension-building, battering, and reconciliation that repeats over prolonged periods). A plea of guilty to either offense can put a defendant on the road to rehabilitation and take him permanently away from the criminal justice system. Similarly, a prosecution and guilty plea may deter offenders from engaging in their conduct again. Jeffrey Edleson & Maryann Syers, *The Relative Effectiveness of Group Treatments for Men Who Batter*, SOC. WORK RES. & ABSTRACTS, June 1990, at 10 (finding that court-ordered treatment is effective in reducing recidivism among batterers); Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 219 (1999) ("after one time through the process, batterers are more acutely aware of the threat of certain prosecution, which can act as an even more effective deterrent than mere arrest); Richard M. Tolman & Arlene Weisz, *Coordinated Community Intervention for Domestic Violence: The Effects of Arrest and Prosecution on Recidivism of Woman Abuse Perpetrators*, 41 CRIME & DELINQ. 481 (1995) (finding that the combination of arrest and prosecution prevented and deterred recidivism among male batterers). Conversely,

drunk drivers who escape punishment are highly likely to reoffend. Jiang Yu & William R. Williford, *Drunk-driving Recidivism: Predicting Factors from Arrest Context and Case Disposition*, 56 J. STUD. ON ALCOHOL 60 (1995).

Impeding future pleas may also hinder rehabilitation of these offenders. A guilty plea may sometimes amount to the first step down the road to rehabilitation. *See Brady v. United States*, 397 U.S. 742, 753 (1970) (endorsing the guilty plea as a signal that the defendant "is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary"); *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992) ("[g]enerally, a guilty plea is a positive first step to rehabilitation"); *see also* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2001) (providing for less severe sentence "[i]f the defendant clearly demonstrates acceptance of his responsibility for his offense"). In the same vein, twelve-step programs such as Alcoholics Anonymous require admitting that one has a problem as an essential step to recovery. ALCOHOLICS ANONYMOUS, TWELVE STEPS AND TWELVE TRADITIONS 55-62 (1981) (requiring alcoholics to confess their drinking problems to others as a way of puncturing their rationalizations, illusions, and wishful thinking). Even an insincere guilty plea may be a step towards true acceptance of responsibility, and it can also bring vindication, healing, closure, and finality to victims and the community at large. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1398, 1400, 1406-07 (2003). Conversely, some defense counsel may protract litigation and encourage clients to remain in

denial rather than coming clean and admitting guilt in a guilty plea. Encouraging defense counsel to foster this adversarial stance may harden defendants' denial, making them less amenable to treatment later on. *See id.* at 1397, 1404-06.

In addition, guilty pleas move offenders into court-ordered treatment more quickly. These treatment programs can reduce recidivism by drunk drivers and domestic abusers, particularly when coupled with punishment or the threat of punishment. *See* Huey-tsyh Chen et al., *Evaluating the Effectiveness of a Court Sponsored Abuser Treatment Program*, 4 J. FAM. VIOLENCE 309 (1989) (finding that a domestic-abuse treatment program reduced recidivism rates to 10% over the next 14 months); L. Kevin Hamberger & James E. Hastings, *Skills Training for Treatment of Spouse Abusers: An Outcome Study*, 3 J. FAM. VIOLENCE 121, 126 (1988) (finding that a domestic-abuse treatment program reduced recidivism from 47% to 28%); Christopher M. Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. FAM. VIOLENCE 263, 278-79 (1998) (finding that prosecution and court-mandated domestic-violence treatment lowered recidivism significantly); Nichols, *supra*, 14 ALCOHOL HEALTH & RES. WORLD 44 (finding that education programs reduce drunk-driving recidivism among first offenders and nonproblem drinkers and that legal sanctions such as license suspension are effective in deterring and incapacitating drunk drivers); W. Larry Campbell, *An Alternative for Drunk Drivers*, 10 ADDICTION & RECOVERY 46 (1990) (finding that court-ordered alcohol counseling coupled with an education program reduced drunk-driving recidivism). Delaying entry of a guilty plea, in contrast,

may leave the untreated defendant free on bail, particularly because these misdemeanors are likely to carry low bails and no pretrial detention. While free on bail, the defendant may well drive drunk or abuse again.

The decision below, by impeding knowing, voluntary guilty pleas, undermines the government's interest in quickly deterring, incapacitating, and treating recidivists generally and drunk drivers and domestic abusers in particular.

B. The Iowa Court Erroneously Placed the Burden on the Prosecution to Prove That Respondent, Who Had Expressly Declined the Assistance of Counsel, Knowingly Waived the Right to Counsel When He Pleaded Guilty to OWI in 1996.

The decision below required the prosecution in collateral proceedings to prove that a *pro se* defendant knowingly waived the right to counsel before entering a guilty plea, even though he expressly declined the assistance of counsel. (Pet. App. 18-19.) The Iowa court's interpretation of the Sixth Amendment contravenes this Court's holdings.

When the record contains no indication that a *pro se* defendant declined the assistance of counsel in entering a guilty plea, on collateral attack the prosecution bears the burden of proving a knowing waiver of the right to counsel. Conversely, when the record shows that a *pro se* criminal defendant knew of that right but desired to proceed without the assistance of counsel, on collateral attack the criminal defendant bears the burden of proving that he did not knowingly waive the right to counsel. These are the teachings of *Moore v. Michigan*, 355 U.S.

155, 161-62 (1957) and *Carnley v. Cochran*, 369 U.S. 506, 517 (1962). *Teske v. State*, 507 So.2d 569, 571-72 (Ala. Cr. App. 1987); *State v. Hamilton*, 725 P.2d 590, 592 (N.M. Ct. App. 1986); C. Allen Parker, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363, 382 n.124 (1982).

The court below ignored those teachings. Without citing any authority, the court simply placed the burden upon the prosecution to show that Respondent – who had expressly declined the assistance of counsel for his 1996 OWI offense – knowingly waived his right to counsel. (Pet. App. 18-19.)

This misplaced burden of proof creates enormous practical problems for prosecutors, who cannot retrieve records that never existed or were destroyed long ago. Though there happens to have been a transcript of the earlier plea colloquy in this case, this misplaced burden of proof will cause prosecutors great practical difficulties in future cases in which transcripts were never made or have long since been destroyed or lost. State-court waivers of counsel and guilty-plea proceedings in misdemeanor cases commonly go unreported. Even if the proceedings are reported, court personnel routinely destroy transcripts, audiotapes, and other documents as part of record-retention policies. *Nichols v. United States*, 511 U.S. 738, 748 (1994) ("a large number of misdemeanor convictions take place in police or justice courts which are not courts of record"; thus, "without a drastic change in the procedures of these courts, there would be no way to memorialize" a warning "that a misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime"); *accord United States v. Hartsock*, 2003 WL

22330976, at *7 (1st Cir. Oct. 10, 2003); *see, e.g., Moore v. Michigan*, 355 U.S. at 157; *United States ex rel. Ackerman v. Russell*, 388 F.2d 21, 24 (3rd Cir. 1968); *United States v. Bethurum*, 213 F. Supp.2d 679, 683-84 (N.D. Tex. 2002); Pam Louwagie, *Court-hearing Transcripts No Longer Mandatory*, MINNEAPOLIS-ST. PAUL STAR-TRIBUNE, at 5B (Nov. 4, 2003) (reporting that under a Minnesota Supreme Court order, most felony and gross misdemeanor pleas and sentences will be audiotaped but not transcribed unless a court orders it or someone else pays for the transcript). *See generally* NAT'L CENTER FOR STATE COURTS, SMALL CLAIMS AND TRAFFIC COURTS: CASE MANAGEMENT PROCEDURES, CASE CHARACTERISTICS, AND OUTCOMES IN 12 URBAN JURISDICTIONS 111 (1992) (paperwork generated by traffic cases, the single largest category of cases in state trial courts, places the most serious burden upon court administration); DONALD S. SKUPSKY & JOHN C. MONTANA, LAW, RECORDS AND INFORMATION MANAGEMENT 131 (1994) (record-retention programs try to balance the duty to preserve evidence against the need to eliminate valueless records, reduce space requirements, and reduce costs). There are no national standards, guidelines, or formats for the retention of records, leaving each state to define its own schedule. THOMAS G. DIBBLE, A GUIDE TO COURT RECORDS MANAGEMENT 44 (Nat'l Center for State Courts 1986). Thus, some states keep no transcripts of plea hearings in misdemeanor cases, and others routinely destroy them after a limited period of time. In states with no clear policies or a variety of policies, it may be impossible to know ahead of time what records are available. The result may be futile searches for records that may never have existed or may have been destroyed long ago.

In *Moore v. Michigan*, this Court alleviated these problems by allowing any indication of waiver to shift the burden to the defense. Prosecutors who seek to use a defendant's prior conviction to enhance punishment may rely upon certified copies of court records that reveal that the conviction resulted from a guilty plea at which the defendant declined the assistance of counsel. If the defendant in a collateral proceeding then alleges that he did not know of his right to counsel in entering the plea or that he did not knowingly waive that right, he bears the burden of proof. An alleged denial of the right to counsel that appears on the face of court records is a simple matter to prove. As this Court has suggested, there is a prima facie constitutional violation where "the certified records of [a prior] conviction on their face raise a presumption that petitioner was denied his right to counsel. . . . [A court cannot p]resum[e] waiver of counsel from a silent record. . . ." *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967). But if the docket sheet, judgment roll, or minute orders indicate that a defendant waived or declined counsel, any further inquiry behind the face of the records would be much more burdensome. Thus, this Court has been wary of allowing collateral attacks on prior convictions to go beyond the face of the official court records. "Ease of administration . . . supports the distinction. . . . [F]ailure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But . . . failure to assure that a guilty plea was voluntary[] would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." *Custis v. United States*, 511 U.S. 485, 496 (1994).

In light of these difficulties, shifting the burden of proof to the prosecution would greatly hinder or even preclude effective enforcement of recidivist statutes. It is hard enough to find witnesses who can recall events occurring in the recent past. It is all but impossible to find them years later. As one commentator explains, a collateral attack on a guilty plea may arise years later and "require[] examining incomplete records from far away jurisdictions in cases long ago closed and forgotten. The practical problems of finding the facts to support or refute a claim about the validity of a plea in such conditions are immense." 2 DAVID ROSSMAN, CRIMINAL LAW ADVOCACY: GUILTY PLEAS ¶ 6.06, at 6-51 (2003).

United States v. Hartsock, 2003 WL 22330976 (1st Cir. Oct. 10, 2003) considered these practical problems in the context of 18 U.S.C. § 922(g)(9). That statute restricts the carrying of weapons by anyone convicted of a misdemeanor crime of domestic violence, except when the prior conviction occurred without counsel or without a knowing and intelligent waiver of counsel. At issue was whether prosecutors or defendants bear the burden of proving the lack-of-counsel exception.

After observing that State authorities had destroyed the plea transcripts of the defendant's 1992 domestic assault conviction during routine space-saving procedures, *Hartsock, supra,* at *1, the First Circuit held that defendants seeking to take advantage of the exception must prove that they never knowingly and intelligently waived the right to counsel. *Id.* at *7. Placing the burden of proof on the prosecution would substantially hamper its ability to enforce and effectuate the statute, because "the prosecution will often not be able to offer any proof beyond the record of the prior conviction. State courts routinely

destroy supporting records. As such, requiring the [prosecution] to shoulder the burden of persuasion would ... place "'an impossible burden on the prosecution to establish the existence of facts within the special knowledge of the defendant.'" *Id.* (quoting 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 1.8 (1986)).

The First Circuit's analysis illustrates why the decision below would create a large loophole for recidivists to exploit and thereby defeat society's interest in imposing greater punishment for repeat violators of the laws. *See generally Lockyer v. Andrade*, 538 U.S. 63, __, 123 S. Ct. 1166, 1177-78 (2003); *Rummel v. Estelle*, 445 U.S. 263, 284 (1980).

In placing the burden upon defendants in collateral proceedings to show an unknowing waiver when the record discloses that they declined the assistance of counsel, this Court in *Moore* and *Carnley* recognized the importance of promoting the finality of judgments. This interest in finality supports giving a prior judgment its "'normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgment.'" *Custis v. United States*, 511 U.S. 485, 497 (1994) (quoting *Parke v. Raley*, 506 U.S. 20, 30 (1992)). "Inroads on the concepts of finality tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. *United States v. Addonizio*, 442 U.S. 178, 184 n. 11 (1979). The decision below – in which Respondent successfully mounted a collateral attack upon a *pro se* guilty plea without offering any evidence that he lacked knowledge about the advantages of counsel when he entered that plea

– does little to promote public confidence in final judgments or the court system.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully asks this Court to reverse the judgment of the Supreme Court of Iowa.

Respectfully submitted,

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